DELOS
dispute resolution

GUIDE TO ARBITRATION PLACES (GAP)

SOUTH AFRICA

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JURISDICTION INDICATIVE TRAFFIC LIGHTS

1. Law
   a. Framework
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   c. Limited court intervention
   d. Arbitrator immunity from civil liability
2. Judiciary
3. Legal expertise
4. Rights of representation
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6. Ethics

   Evolution of above compared to previous year

7. Tech friendliness
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VERSION: 9 DECEMBER 2022 (v01.00)

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline any and all responsibility.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Key places of arbitration in the jurisdiction?	Johannesburg, Pretoria and Cape Town.
Civil law / Common law environment?	Mixed. South African legislation (including its constitution) is supreme. In terms of history and legal tradition, before the 19th century, it was a predominantly Roman-Dutch law jurisdiction. After the British occupation of parts of the country, heavy influence of English law in certain legal areas in particular, including contract, commercial law, and negotiable instruments. Prior to 1994, the law thus largely was an amalgam of civil (Roman-Dutch) and common (English) law. Since the advent of constitutional democracy in 1994, the courts apply a far wider range of legal sources with due deference to legal source hierarchy: (i) the Constitution is supreme, and thus all the lower-tier laws must be interpreted or modified in accordance with the Constitution; (ii) statute and the common law are next in line. The common law has its origin in English and Roman-Dutch law; (iii) international treaties which have been incorporated into domestic legislation are law in South Africa as is customary international law; (iv) African customary law may also be applicable in certain cases; (v) in giving an interpretation of a law or determining a remedy, the courts are often permitted and sometimes enjoined to consider international law and foreign law more generally.
Confidentiality of arbitrations?	Confidentiality may be agreed and such privacy and confidentiality will ordinarily be enforced. Under the IAA, however, international arbitrations involving public bodies are to be held in public, unless for compelling reasons, the arbitral tribunal directs otherwise.
Requirement to retain (local) counsel?	No.
Ability to present party employee witness testimony?	Yes.
Ability to hold meetings and/or hearings outside of the seat and/or remotely?	Yes.
Availability of interest as a remedy?	Available. If South African substantive law applies, interest may, however, be capped at double the principal sum awarded.
Ability to claim for reasonable costs incurred for the arbitration?	Yes.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Contingency fees are regulated by statute: they can be the normal fees charged, which are uncapped, or the lesser of 25% of the sum recovered or double the normal fees which would have been charged. There is no per se restriction on third party funding, although this cannot be used to perpetrate any abuse of process and third-party

	funders may face additional financial exposure if the party they fund loses but cannot satisfy costs awarded against it.
Party to the New York Convention?	Yes.
Party to the ICSID Convention?	No.
Compatibility with the Delos Rules?	High.
Default time-limitation period for civil actions (including contractual)?	If South African substantive law applies, then the South African law of prescription likely applies. The prescription period for most debts is three years, although there are debts which carry substantially higher prescription periods.
Other key points to note?	ϕ
World Bank, Enforcing Contracts: *Doing Business* score for the current year, if available?	ϕ
World Justice Project, Rule of Law Index: *Civil Justice* score for 2021, if available?	0.61 (2021 score).

ARBITRATION PRACTITIONER SUMMARY

Date of arbitration law?	International Arbitration Act ("**IAA**") - 20 December 2017. Arbitration Act – 14 April 1965.
UNCITRAL Model Law? If so, any key changes thereto? 2006 version?	IAA incorporates (subject to some modifications) the UNCITRAL Model Law (2006 version). Thus, all international arbitrations seated in South Africa initiated after 20 December 2017 will be subject to the Model Law, as incorporated in the IAA. Examples of important deviations from the Model Law include that ex parte interim relief cannot be secured and sections 17B and 17C of the Model Law have not been adopted.
Availability of specialized courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	There are no specialised courts to deal specifically with arbitrations. Arbitration-related matters go to the normal High Court in the province where the arbitration is taking place. In Gauteng, which is our commercial hub, the High Court has created an additional track of cases termed "Commercial Court" which has a judge handling case management and tends to result in faster enrolment and adjudication.
Availability of *ex parte* pre-arbitration interim measures?	Yes.
Courts' attitude towards the competence-competence principle?	The courts have accepted this principle. Generally, an arbitration tribunal will not be precluded from enquiring into the scope of its jurisdiction when a jurisdictional objection is raised. The tribunal's ruling may be subject to court review, either after the award is made or, in certain circumstances, during the arbitration proceedings and prior to the award.
May an arbitral tribunal render a ruling on jurisdiction (or other issues) with reasons to follow in a subsequent award?	In accordance with the provisions of the Model Law, an award is intended to be accompanied by reasons. It is not exactly clear from the case law whether a bifurcation of reasons and "order" is permissible. In practice, however, it frequently happens in cases of urgency, but ordinarily pursuant to the arbitrator agreeing this with the parties.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	None: the Act incorporates the New York Convention criteria. There is no "annulment" in the manner contemplated in the Washington (ICSID) Convention, 1965; on a review and setting aside of awards based on New York Convention criteria.
Do annulment proceedings typically suspend enforcement proceedings?	Not automatically. This can either be agreed or an interim interdict (injunction) obtained to this end.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The IAA provides that a court has a discretion in this regard in accordance with the New York Convention jurisprudence.

If an arbitral tribunal were to order a hearing to be conducted remotely (in whole or in part) despite a party's objection, would such an order affect the recognition or enforceability of an ensuing award in the jurisdiction?	It very much depends on the mandate given to the arbitrator. If the mandate was narrow (e.g., specifying that there shall be an in-person hearing at a specific place), then this may be an issue on enforcement. Of course, irrespective of the scope of the mandate, if the process followed by the arbitrator meant that the party in question did not have a reasonable opportunity to set forth its case, then this may be a further ground for refusing enforcement. Even in those circumstances, however, much will depend on the terms of the arbitration agreement, as a party could have waived rights to a hearing.
Key points to note in relation to arbitration with and enforcement of awards against public bodies at the jurisdiction?	Under South African law, certain public law disputes are incapable of arbitration, such as reviews of the exercise of executive power and administrative and constitutional law challenges. Assuming an award is properly granted against a public body, our courts should enforce this and would not afford public bodies any preference or unwarranted protections. We have noted above the limited circumstances in which an international arbitration against a public body will be conducted in private.
Is the validity of blockchain-based evidence recognised?	Has not been dealt with in practice but there is arguably room for blockchain evidence to be recognised. Given that the blockchain would likely be a platform on which evidence is stored, as opposed to constituting direct evidence itself, the location of such evidence should not invalidate it. The question is the authenticity and integrity of the evidence, and this is to be established by setting forth the process of verification. If there are particular aspects of the blockchain which themselves constitute evidence – such as sequencing of events or access logs – then these would be treated in accordance with the ordinary rules of evidence and could be admitted.
Where an arbitration agreement and/or award is recorded on a blockchain, is it recognised as valid?	This has not been tested in South Africa and it is difficult to venture an opinion. Ordinarily, parties in South African-seated international arbitrations would agree upfront in what manner the arbitral award may be delivered. If so agreed, there should be no difficulty of enforcement. An arbitration agreement is required to be in writing. This requirement is widely defined in legislation relevant to domestic and international arbitration. Depending on the facts, an agreement to arbitrate concluded by way of blockchain could conceivably be recognised as an enforceable arbitration agreement, but it is not possible to state general rules in this regard.
Would a court consider a blockchain arbitration agreement and/or award as originals for the purposes of recognition and enforcement?	Potentially, although the party seeking recognition / enforcement may have to prove compliance with various electronic communications statutes.
Other key points to note?	ϕ

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model law? 1985 or 2006 version?

South Africa's international arbitration law is based on the UNCITRAL Model Law adopted on 21 June 1985, with amendments as per 7 July 2006. In 1998 the South African Law Commission recognised that South Africa did not have a suitable international arbitration statute that could govern the burgeoning international business transaction environment. The Commission proposed that an effective legislative framework for the resolution of international disputes be created. The legislation would implement the UNCITRAL Model Law, which would bring South African arbitration law in line with international norms.

That process culminated with the promulgation of the International Arbitration Act 15 of 2017 ("**the IAA**"). The IAA applies to international arbitrations (as per article 1 of the Model Law) and incorporates the UNCITRAL Model Law, subject to some amendments (and this version is referred to herein as the Model Law). This modified Model Law has the force of law within South Africa under the IAA.

The IAA must be distinguished from the Arbitration Act 42 of 1965 ("**the domestic Arbitration Act**"), which regulates domestic arbitrations in South Africa.

1.2 When was the arbitration law last revised?

International arbitration law has not been revised or amended since the enactment of the IAA on 20 December 2017. The legislation has not undergone any development in the case law.

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

An arbitration agreement is a contract.[1] It will, therefore, be understood and interpreted in accordance with the rules governing the interpretation of any written contract.[2] The arbitration agreement is based on consensus between the parties and is a self-contained contract collateral or ancillary to the main agreement in which it may be contained.[3] It may remain operative even where the main agreement is terminated.[4] South African courts will defer to the intentions of the contracting parties when required to construe a contract and will take into consideration the words used by the parities, the contract as a whole, including the context within which the contract was concluded.[5]

It is advisable, as best practice, for the contracting parties to stipulate the applicable substantive law of the contract and the procedural law of the arbitration (ie, the *lex arbitri*), but, in the absence of express terms to this end, a Court will interpret the contract to determine these aspects. If the law of the arbitration agreement / clause is to be distinct from the law governing the contract in which it is housed, it is suggested that this be expressly recorded.

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1 De Lange v Presiding Bishop for the time being of the Methodist Church of Southern Africa and Another 2015 (1) SA 106 (SCA) at para 46; South African Transport Services v Wilson NO And Another 1990 (3) SA 333 (W) at page 340.

2 Cone Textile (Pvt) Ltd v Ayres and Another 1980 (4) SA 728 (ZAD).

3 Cool Ideas 1186 CC v Hubbard and Another 2014 (4) SA 474 (CC), paras 45 and 46.

4 South African Transport Services v Wilson NO And Another 1990 (3) SA 333 (W) pgs 340 and 341.

5 North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd 2013 (5) SA 1 (SCA) at para 24.

2.2 In the absence of an express designation of a 'seat' in the arbitration agreement, how do the courts deal with references therein to a 'venue' or 'place' of arbitration?

Article 20(1) of the Model Law under Schedule 1 of the IAA provides that the parties are free to agree on the juridical seat of arbitration. Failing such agreement, the juridical seat of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

If the parties have chosen a place or venue of arbitration but have not determined the juridical seat or *lex arbitri*, it is likely that the *lex arbitri* will be the law of the place or venue of arbitration, unless there are indications of a contrary intention by the parties.

2.3 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Yes, the arbitration agreement is generally considered to be independent and severable from the main contract.[6] The arbitration agreement can remain in existence even where the main agreement is terminated. Unless the arbitration agreement provides otherwise, it may only be terminated with the consent of the parties to it.

South African courts have accepted the severability of an arbitration agreement from the main agreement in cases of voidable main agreements but have, historically, not readily accepted this severability in the case of void contracts. There are indications that the courts are beginning to be receptive to the notion that the arbitration agreement and the main agreement are distinct and independent from one another, even in circumstances whereby the main agreement is void.[7] The current trend is to give effect to the intention of the parties as reflected in the written instruments they have agreed, recognising that "*the parties have wide-ranging autonomy to agree that matters concerning the validity, enforceability and existence of an agreement shall be referred to arbitration*".[8]

2.4 What are formal requirements (if any) for an enforceable arbitration agreement?

An arbitration agreement is a contract. Thus, where an offer to submit to arbitration is made, the acceptance of the offer must be unconditional and unqualified, failing which there is no proper acceptance and no binding agreement to go to arbitration.

In terms of article 7(1) of the Model Law an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Article 7(2) provides that the arbitration agreement shall be in writing. The agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.[9] The "in writing" requirement will be satisfied in instances of electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.[10] Signature of the written agreement by the parties is not a requirement.

Parties can expressly or tacitly enlarge the scope of the submission to arbitration during the proceedings as long as the new matters contained in the submission are still covered by the original arbitration agreement[11] or that agreement is amended.

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6 Canton Trading 17 (Pty) Ltd t/a Cube Architects v Fanti Bekker Hattingh N O 2022 (4) SA 420 (SCA) at paras 37 and 58.

7 Remo Ventures (Pty) Ltd and Others v The Honourable Justice Neels Claassen and Others (29662/2021) [2022] ZAGPPHC 621 (16 August 2022); North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd 2013 (5) SA 1 (SCA) at para 16.

8 Canton Trading 17 (Pty) Ltd t/a Cube Architects v Fanti Bekker Hattingh N O 2022 (4) SA 420 (SCA) at para 38.

9 Article 7(3) of the Model Law.

10 Article 7(4) of the Model Law.

11 Butler and Finsen Arbitration in South Africa: Law and Practice (1993), 38.

Moreover, certain disputes are not arbitrable, such as the review of executive or administrative power, constitutional challenges to legislation, divorce, proceedings to determine status, criminal proceedings, Competition Act breaches etc.

2.5 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

Absent agreement, the third party will not be bound.

Arbitration is consensual. Therefore, a party's liability can only be determined by arbitration if it consented to the arbitration agreement.

A person is bound by an arbitration agreement purportedly entered into on her / his behalf by a representative with a third party only if the representative had actual or apparent authority from that person to enter into the agreement on his behalf, or if that person is precluded from denying such authority by virtue of the principles of estoppel.

2.6 Are there restrictions to arbitrability? In the affirmative:

Yes.

2.6.1 Do these restrictions relate to specific domains (such as IP, anti-trust, employment law etc.)?

Certain disputes are stated to be non-arbitrable, that is they cannot be resolved by private arbitration and, on public policy grounds, are reserved for national courts. In terms of section 2 of the domestic Arbitration Act a reference to arbitration shall not be permissible in respect of any matrimonial cause or any matter incidental to any such cause, and any matter relating to status. Section 4(2) of the Act states that section 2 of the domestic Arbitration Act applies for the purposes of chapter 3 of the International Arbitration Act. The wording "*any matter incidental to any such cause*" is sufficiently wide to exclude from arbitration matters relating to the interests of minor children in a matrimonial dispute, for instance custody and access.[12] Disputes relating to the proprietary consequences of a divorce appear not to be considered arbitrable.[13]

Criminal matters may not be referred to arbitration. Section 35(3)(c) of the Constitution of the Republic of South Africa, 1996 stipulates that an accused has a right to a public trial before an ordinary court. It is, however, permissible to refer a civil claim arising out of a criminal act for arbitration.[14] A question as to whether or not a contract is void for illegality may be submitted to arbitration, provided that there is a valid arbitration agreement which is sufficiently wide to cover the submission.

Public law claims brought relying on the Promotion of Administrative Justice Act, 2000 may not be determined by arbitration.[15] Section 7(4) of PAJA provides that all proceedings for judicial review under the Act must be instituted in a High Court or another court having jurisdiction. Similar principles would be applicable to constitutional challenges.

There are also several bespoke statutes in South Africa establishing a court or other tribunal structures for adjudicating disputes within the context of an industry or a statute. In those circumstances, it may not be permissible to arbitrate disputes concerning alleged transgressions of the Competition Act, 1998 (antitrust legislation).

12 Ressell v Resell 1976 (1) SA 289 (W), pg 291.

13 Pitt v Pitt 1991 (3) SA 863 (D), pg 864.

14 Butler and Finsen 55.

15 Airports Company South Africa Ltd v ISO Leisure OR Tambo (Pty) Ltd and Another 2011 (4) SA 642 (GSJ), paras 67-68.

The courts have also held that a person accused of fraud in arbitral proceedings may insist on such proceedings being held before court.[16]

2.6.2 Do these restrictions relate to specific persons (i.e., State entities, consumers etc.)?

In terms of the IAA, any international commercial dispute which the parties have agreed to submit to arbitration (and which falls within the scope of that agreement) is arbitrable, save where the agreement is contrary to South African public policy, or the dispute itself is not capable of determination by arbitration under the laws of South Africa.

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

3.1.1 If the place of the arbitration is inside of the jurisdiction?

Yes. The courts are generally extremely supportive of arbitration and would likely stay litigation should a party prove that the dispute is such that an arbitration clause applies thereto. Our courts do retain a discretion in this regard, but the courts ordinarily defer to a contractual choice of arbitration as a mechanism for dispute resolution.

3.1.2 If the place of the arbitration is outside of the jurisdiction?

The location of the arbitration itself does not typically shape the court's attitude to upholding arbitration clauses – the answer in 3.1.1 thus applies in equal force. Of course, if an argument is made out that the arbitration in a foreign jurisdiction will actually infringe on some fundamental rights or would not afford a fair hearing, a distinction may well be drawn by South African courts on this basis and the litigation may not be stayed, the arbitration may not be recognised and any arbitral award may not be enforced.

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

Any award of the arbitrator (interim or final), to have the force of law, would need to go through the process of being recognised and enforced in South Africa. If an injunctive award made by the arbitrator was within his/her jurisdiction and did not affect parties not before him/her, then it could notionally be given effect by the court, even if broad in remit. We are not aware of any case law in South Africa, however, which either upheld or denied recognition or enforcement of a wide anti-suit injunction issued by the arbitrator. In giving effect to any such order, the court would be careful to consider its impact on the constitutional right of access to court.

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to anti-suit injunctions/anti-arbitration injunctions or orders, but not only)

These grounds would be limited. A South African court would more likely engage with an arbitration seated outside its jurisdiction if it came to recognising and enforcing such award within South Africa. It could also be engaged in support of an arbitral process elsewhere, such as for the purposes of obtaining information necessary for a foreign-seated arbitration. One of the guiding considerations in exercising jurisdiction by South African courts is effectiveness. Thus, a South African court may hesitate to issue an order which will be practically ineffective. But on the other hand, it may also be inclined to step in where there is some basis on which the order may be enforced (e.g. by way of contempt of court) even if the subject matter of the dispute is beyond its borders.[17]

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16 Rawstorne v Hodgen 2002 (3) SA 433 (W).

17 Metlika Trading Ltd v Commissioner, SARS 2005 (3) SA 1 (SCA).

4. The conduct of the proceedings

4.1 Can parties retain foreign counsel or be self-represented?

In the arbitration, yes.

Parties can be self-represented. South Africa has no policy or restrictions on representation by foreign or external counsel.

4.2 How strictly do courts control arbitrators' independence and impartiality? For example, does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

When approached in connection with a possible appointment as an arbitrator, the relevant individual is required to disclose any circumstances likely to give rise to justifiable doubts as to his / her impartiality or independence. This duty of disclosure exists for the duration of the arbitration proceedings (should new circumstances arise which warrant disclosure).

Parties may agree on a procedure for a challenge to the appointment of an arbitrator, failing which the challenge is governed by Article 13 of the Model Law, in terms of which, unless the arbitrator fails to step down or the parties both agree to the challenge, the arbitral tribunal shall decide on the challenge. Only upon receiving a dissatisfying or unsuccessful outcome of the challenge can a party then take up the challenge with the courts. Justifiable doubt and good cause must be shown for the setting aside of the appointment of an arbitrator by a court, on application by either party.

Disclosure is a material requirement, but all the circumstances will be considered to determine whether this is sufficient to give rise to justifiable doubts as to impartiality.

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?

In international arbitrations (similarly to domestic arbitrations), failing (1) agreement by the parties as to the constitution of the arbitral tribunal and (2) a contractually agreed appointment mechanism, a party may apply to the relevant court which enjoys jurisdiction, and this court may appoint an arbitrator or arbitral tribunal, as per Article 11 of the Model Law.

4.4 Do courts have the power to issue interim measures in connection with arbitrations? If so, are they willing to consider *ex parte* requests?

Yes.

It is generally accepted that parties are able to request the courts to issue interim measures before or during arbitral proceedings, which requests courts may grant subject to certain limitations. Such requests can coexist alongside arbitration agreements.

Pursuant to the terms of section 21 of the domestic Arbitration Act, courts may issue interim measures such as interim custody of goods or property (at section 21(e)) and any interim interdicts or other relief (at section 21(f)). This would include *ex parte* orders, as courts are afforded the same powers, they generally have in relation to non-arbitration matters before them.

In international arbitrations, Article 17J provides for court-ordered interim measures, where, at the request of a party, the court will have the same powers in respect of the arbitration proceedings as it has for purposes of proceedings before that court, regardless of whether the juridical seat of the arbitration is in South Africa.

Article 17J further provides for constraints on the powers of the courts in this regard. Courts cannot make an order in respect of an interim measure unless the arbitral tribunal has not been appointed and the matter is urgent; the arbitral tribunal is not competent to grant the order; or if the urgency of the matter renders it

impractical to seek such relief from the arbitral tribunal. Further, the court cannot make a ruling in respect of an interim measure that has already been determined by the arbitrator or arbitration tribunal. The court's ruling in respect of an interim measure in an arbitration cannot be appealed and is thus final.

The specific powers of a court to issue an interim measure in terms of the IAA, as set out in Article 17J, are the granting of:

- orders for the preservation, interim custody or sale of any goods which are the subject matter of the dispute;
- an order securing the amount in dispute, but not an order for security for costs;
- an order appointing a liquidator;
- any other orders to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by the other party;
- an interim interdict or other interim order.

No interim measures beyond those contained above in Article 17J may be granted by the courts.

Although not expressly stated, a court would thus be able to grant *ex parte* orders as it enjoys that power for proceedings before it. But like any *ex parte* order, that will not be final and unappealable, and the party against whom it was granted may set it down for reconsideration in accordance with the ordinary court processes.

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

Domestically, no; but yes, for international arbitrations.

Domestic arbitration proceedings are not presumed to be confidential, but the parties may, by agreement, provide for confidentiality and privacy and this will typically be honoured by arbitrators and courts alike.

Section 11 of the IAA has peculiar provisions. First, it states that arbitral proceedings involving public bodies are not confidential unless the arbitral tribunal "*for compelling reasons*" directs otherwise. Second, it provides that "*[w]here the arbitration is held in private*", the award and all documents must be kept confidential. Thus, where a public body is involved, the parties would need to petition the tribunal to keep the process confidential. In all other cases, the parties should still expressly agree at the very least that the arbitration is to be held in private to ensure that the confidentiality regime applies.

4.5.2 Does it regulate the length of arbitration proceedings?

In domestic arbitrations, under section 23 of the domestic Arbitration Act, the arbitral award has to be rendered within 4 months of the arbitrator having "entered on the reference". The parties commonly waive that requirement. There is no time-related limit set forth in the IAA.

4.5.3 Does it regulate the place where hearings and/or meetings may be held, and can hearings and/or meetings be held remotely, even if a party objects?

No. The question is what the parties agreed (on a proper interpretation of the arbitration agreement), and what the scope is of the power of the arbitrator under the parties' agreement. The parties are generally free to regulate the procedure of their arbitration.

4.5.4 Does it allow for arbitrators to issue interim measures? In the affirmative, under what conditions?

Yes.

Section 26 of the domestic Arbitration Act provides that, unless the arbitration agreement provides otherwise, an arbitrator or arbitration tribunal may make an interim award at any time within the period allowed for making an award.

Similarly, articles 17 and 17A of the Model Law provide that an arbitrator or arbitration tribunal may, at the request of a party and unless otherwise agreed by the parties, grant interim measures such as:

- the maintenance or restoring of the *status quo* pending determination of the dispute;
- taking action that would prevent, or refraining from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
- providing a means of preserving assets out of which a subsequent award may be satisfied;
- preserving evidence that may be relevant and material to the resolution of the dispute; or
- providing security for costs.

This granting of the above-mentioned interim measures is subject to stipulated conditions, namely, the party seeking the interim measure must satisfy the arbitrator or tribunal that:

- harm that is unlikely to be remedied by an award of damages shall ensue if said measure is not ordered, where such harm will outweigh the harm likely to be suffered by the party against whom the interim measure is made should it be granted; and
- there is a reasonable possibility that the party seeking the interim measure will succeed on the merits of the claim, where the determination on this possibility must not affect the discretion of the arbitrator or tribunal in making a subsequent determination.

Once interim relief has been granted, it may be modified, suspended or terminated by the arbitrator(s), either on application or *mero motu* (in exceptional cases, and on notice). The arbitrator(s) may also require the provision of security by the party seeking interim measures and order a duty to disclose any material change in circumstances relevant to the interim relief.

The Model Law as adopted by the IAA does not include articles 17B and C, and thus does not provide for preliminary or *ex parte* arbitral awards.

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence? For example, are there any restrictions to the presentation of testimony by a party employee?

The parties are free to decide what the power of the arbitral tribunal will be in relation to rules of evidence. As a matter of practice, where South African law is the *lex arbitri*, most parties and arbitrators default to the South African rules of evidence applicable in courts.

As per Article 19 of the Model Law, failing agreement by the parties as to the procedure, the arbitrator or arbitration tribunal has power to admit, exclude and weigh up evidence as it sees appropriate. Moreover, there are no restrictions on the presentation of testimony by a party employee or any such witnesses related or unrelated to the parties.

Additionally, a party, arbitrator or tribunal may request assistance from the courts in taking evidence, at which point the court shall take evidence according to its own rules, in terms of Article 27 of the Model Law.

Domestically, a similar position applies.

4.5.6 Does it make it mandatory to hold a hearing?

No. It all depends on the agreement of the parties and the discretion of the arbitral tribunal.

Domestically, in the absence of an express requirement from which the arbitrators cannot depart, the arbitrators would determine the process and procedure of the arbitration and could decide the matter without a hearing.

Similarly, under the Model Law, provided that there is no agreement to the contrary, an arbitral tribunal may determine to forego a hearing and decide a matter only on the basis of documents and other material. If a party requests a hearing, however, then the tribunal shall give effect to such request, and advance notice of any hearing must be given to all parties.

From a practical perspective, while interlocutory applications are sometimes determined purely on paper, it is customary to hold an in-person or virtual hearing on the merits, with witness testimony and oral argument.

4.5.7 Does it prescribe principles governing the awarding of interest?

Yes, to an extent.

Domestically, section 29 of the domestic Arbitration Act provides that interest on awards sounding in monetary terms shall accrue from the date of the award and at the same rate as the judgment debt, unless the award provides otherwise. Moreover, to the extent that South African substantive law applies, that body of law may have additional limitations, such as interest rate limits (usury legislation) and the application of the *in duplum* principle (such that total interest may not exceed the capital amount).

In international arbitrations, Article 31 of the Model Law provides that interest may be awarded unless contrary to an agreement by the parties, and it must be considered appropriate and fair by the arbitrator or tribunal under the circumstances, commencing not earlier than the date on which the cause of action arose and not later than the date of payment. Regard must also be had to the currency in which the award is made.

Our courts may sometimes be loathe to enforce awards which are excessive in nature, such as limiting punitive costs awarded in foreign jurisdictions.[18]

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

This is left largely to the arbitrator, subject to any directions of the parties.

Unless contrary to an agreement by the parties, the arbitrator or arbitration tribunal has discretion as to the allocation, amount, taxation, method of determination and manner of costs (Article 31 of the Model Law and section 35 of the domestic Arbitration Act).

4.6 Liability

4.6.1 Do arbitrators benefit from immunity from civil liability?

Yes (at least for international arbitrations).

The IAA at section 9 provides for the immunity of the arbitrator, arbitration tribunal and arbitration institution from acts or omissions in the course and scope of performing their functions, unless the acts or omissions in question were proven to be done in bad faith.

Domestically, although no express provision to this end exists, it would probably be difficult to sustain a cause of action in law against an arbitrator where he / she acted in good faith.

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

Yes. As per section 22 of the domestic Arbitration Act, the following acts and omissions render one guilty of an offence and liable on conviction for payment of a fine or imprisonment:

- without good cause, failing to appear to give evidence before an arbitration tribunal, in answer to a summons;

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18 Jones v Krok 1995 (1) SA 677 (A).

- failing to remain in attendance at an arbitration tribunal after appearing in answer to a summons, until excused by the tribunal;
- refusing to be sworn or to affirm as a witness after being required to do so by an arbitration tribunal;
- refusing to answer any question lawfully put to them during the proceedings; fully and to the best of their knowledge and belief;
- without good cause, failing to produce before the tribunal any book, document or thing specified in a summons; or
- while arbitration proceedings are in progress, wilfully insulting any arbitrator or umpire conducting the proceedings, or wilfully interrupting the proceedings or otherwise misbehaving where the proceedings are being conducted. The above is subject to the laws governing privilege of a subpoenaed witness.

Additionally, any person who has taken the oath or made an affirmation and knowingly gives false evidence before an arbitration tribunal may be guilty of the offence of perjury and liable on conviction to the relevant penalties thereof

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

Article 31(2) of the Model Law provides that the arbitration award "shall state the reasons upon which it is based, *unless the parties have agreed that no reasons are to be given* or *the award is an award on agreed terms under article 30*".

Domestically, although it is statutorily required that an award be in writing, there is no express requirement of reasons. Reasons are, however, an implicit requirement, as the award is intended to inform the parties of the outcome and how that outcome was reached. As recently stated by the High Court: "*The [Arbitration] Act requires that an award shall be in writing, signed by the members of the tribunal. An award sets out the reasons for the arbitrators' decision. It is not a distillation of perhaps disparate views expressed in the course of deliberations, and compiled by one of the arbitrators. Rather, an award signed by the arbitrators and reduced to writing affords the parties to the arbitration dispositive and authoritative reasons by recourse to which the arbitrators came to the decision that they did.*"[19] Without reasons at all (in the absence of the parties having agreed to dispense with the requirement of reasons), an arbitral award would almost certainly be liable to judicial review.

5.2 Can parties waive the right to seek the annulment of the award?

Neither the Model Law nor the domestic Arbitration Act expressly preclude, or provide, for waiver. It would thus be approached from the dual perspectives of public policy and the law regarding waiver.

Regarding the former, a strong argument could be made that a party could not, in advance, waive a right of annulment, as this may permit otherwise unlawful awards to stand, and would exclude the courts' overarching function in safeguarding the administration of justice.

As to the latter, waiver, as per the Supreme Court of Appeal, is "*a question of fact and it is difficult to establish as there is a factual presumption that a party is not lightly deemed to have waived his rights. For this reason, clear evidence of the waiver is required. For a successful reliance on waiver the evidence must establish that when the alleged waiver occurred the party waiving their right had full knowledge of the existence of the right which they decided to abandon*."[20]

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19 Zamani Marketing and Management Consultants Proprietary Limited and Another v HCI Invest 15 Holdco Proprietary Limited and Others 2021 (5) SA 315 (GJ), para 35.

20 Malatji v Ledwaba NO and Others (Case no 1136/2019) [2021] ZASCA 29 (30 March 2021) para 30.

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

There are no unexpected requirements for the rendering of a valid award in South Africa.

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?

Neither the domestic Arbitration Act nor the IAA provide for an appeal process. Parties may, however, agree an appeal mechanism, such as appealing a decision by a sole arbitrator to a three-person arbitral tribunal.

Section 20 of the domestic Arbitration Act does, however, give the arbitral tribunal the authority to approach a court to state its view on a question of law, which will then be binding on the tribunal and the parties. A court may also order the tribunal to approach the court with such a question. This provision has, to our knowledge, been very rarely successfully invoked and referrals to court are rare.

5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

Arbitral awards rendered by South African-seated tribunals (international and domestic) may be made an order of a South African court and then enforced accordingly (in the same manner domestic court orders are enforced). In neither instance may a court re-interrogate the merits of the arbitration, but the party opposing may counter-apply to review and set aside the arbitral award. This would be on largely procedural grounds, other than the requirement of public policy, and tracks in large measure the grounds identified for setting aside under the Model Law.

Recognition and enforcement of foreign arbitral awards takes place in accordance with the New York Convention practices. In terms of section 17 of the IAA, a party seeking enforcement of a foreign arbitral award must provide the original award and underlying arbitration agreement, authenticated for use in a South African court; alternatively certified copies thereof.

This arbitral award must be recognised and enforced unless:

- The courts finds that
    - the subject matter of the dispute is not arbitrable under the law of the Republic; or
    - the recognition or enforcement of the award is contrary to the public policy of the Republic; or

- the party against whom the award is invoked, proves to the satisfaction of the court that
    - a party to the arbitration agreement had no capacity to contract under the law applicable to that party;
    - the arbitration agreement is invalid under the law to which the parties have subjected it, or where the parties have not subjected it to any law, the arbitration agreement is invalid under the law of the country in which the award was made;
    - that he or she did not receive the required notice regarding the appointment of the arbitrator or of the arbitration proceedings or was otherwise not able to present his or her case;
    - the award deals with a dispute not contemplated by, or not falling within the terms of the reference to arbitration, or contains decisions on matters beyond the scope of the reference to arbitration (in which case those additional decisions may not be recognised);
    - the constitution of the arbitration tribunal or the arbitration procedure was not in accordance with the relevant arbitration agreement or, if the agreement does not provide for such matters, with the law of the country in which the arbitration took place; or
    - the award is not yet binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

There is no express time period provided for the bringing of proceedings to recognise an arbitral award. The award may, however, constitute a debt (under South African law) and would thus prescribe within South Africa if steps were not taken to have the award recognised within three years of the award creditor becoming, or being deemed to be reasonably aware, of the award.

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

No.

An award may be reviewed under the domestic Arbitration Act, or applications brought to set aside an international arbitration award under the IAA.

Neither instrument provides for the automatic staying of the impugned arbitration award. Instead, an interim interdict would have to be secured to pend the award whilst the challenge was determined.

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

Not necessarily – in terms of article 36 of the Model Law, one of the bases on which the court may (ie, has the discretion to) refuse to recognise or enforce an award is where the award has been set aside or suspended by a court of the country in which, or under the law of which, that award was made. Practically, it is unlikely that it would enforce an award that is not enforceable at the relevant seat.

5.8 Are foreign awards readily enforceable in practice?

Yes.

The grounds for a court to refuse recognition and enforcement are narrow, in accordance with international norms. Once recognition is accorded to an award, it can usually be enforced through similar mechanisms as would be available for enforcement of domestic court orders, including attachment and execution of property and potentially even contempt of court.

The recognition process can take some time and will be impacted by the existence and extent of any opposition by the opposing party, as well as the current state of the relevant court roll.

6. Funding arrangements

6.1 Are there laws or regulations to, or restrictions to the use of contingency or alternative fee arrangements or third party funding at the jurisdiction?

South Africa has in place the Contingency Fees Act, 1997, which applies to, *inter alia*, arbitrations. The Contingency Fees Act allows for contingency fee agreements[21] and sets out the requirements for such agreements.[22]

In terms thereof, contingency fees which are higher than the normal fees of the legal practitioner shall not exceed such normal fees by more than 100 per cent: Provided that, in the case of claims sounding in money, the total of any such success fee payable by the client to the legal practitioner, shall not exceed 25% of the total amount awarded or any amount obtained by the client in consequence of the proceedings concerned, which amount shall not include any costs.

South Africa also permits third-party funding arrangements, except where this is an abuse of process.[23] There is no closed list of instances in which a court proceeding constitutes an abuse of process and South African

21 Contingency Fees Act 66 of 1997 Section 2(1).

22 Contingency Fees Act 66 of 1997 Section 3.

23 Price Waterhouse Coopers Inc and Others v National Potato Co-Operative Ltd 2004 (6) SA 66 (SCA) para 50.

courts have not attempted to define the concept exhaustively. For instance, an abuse of process would likely occur where the litigation is being pursued for an ulterior purpose. Thus, if a dispute is brought before court for the purposes of extortion from, oppression of or undue influence over the other party, rather than in pursuit of a bona fide vindication of rights of a plaintiff, this will probably be considered an abuse, If third party funding is what enables the attainment of those illicit ends, such funding arrangement will likely also be contrary to public policy and unlawful.

Moreover, where an unsuccessful party has been funded by another, our courts can hold the funder liable for any costs awarded against that party, should the unsuccessful party not be in a position to pay.[24]

7. Arbitration and blockchain

7.1 Is the validity of blockchain-based evidence recognised?

Not expressly, but neither is it precluded. In terms of the IAA, the arbitral tribunal may, in the absence of agreement by the parties, "*conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence*."

The evidence would likely have to overcome the first threshold – that of materiality – after which it could be considered. There may be additional challenges such that the party attempting to rely on this evidence would need to prove its integrity, authenticity etc., but there is nothing express, or in principle, which would exclude such evidence simply because it is blockchain based.

Article 19 of the Model Law further permits parties to submit, with their statements of claim / defence, references to "other evidence" they will submit, which is read as something distinct to "documents" and may encapsulate evidence of this nature.

7.2 Where an arbitration agreement and/or award is recorded on a blockchain, is it recognised as valid?

There are no provisions in the IAA that explicitly recognise the validity of blockchain recorded arbitration agreements or awards. However, there are similarly no provisions prohibiting agreements or awards in this form.

Article 7(2) of the IAA stipulates that the arbitration agreement shall be in writing. Article 7(3) construes 'in writing' widely and indicates that agreements that are "*recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means*." Article 7(4) further stipulates that the written requirement of an arbitration agreement is met "*by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference*".

Given the broad definitions used, there may be room for an arbitration agreement recorded on blockchain to be valid. There may be challenges in providing the original agreement, authenticated for use in South Africa, or a certified copy thereof, for recognition purposes under section 17 of the IAA, but a sufficiently robust court should accept this provided the integrity and authenticity of the blockchain agreement can be proved.

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[24] Price Waterhouse Coopers Inc v IMF (Australia) Ltd 2013 (6) SA 216 (GNP) p221 D - G: "*Mr Van der Linde SC, who with Mr HC Bothma appeared for the applicants, argued that although there is no South African precedent for making costs orders against persons who fund litigation, the principle has been well established in common-law countries. He referred to Dymocks Franchise Systems (NSW) v Todd and Others [2005] 4 All ER 195 at 2815 and Arkin v Borchard Lines Ltd [2005] EWCA Civ 655 paras 23 and 41. He referred to Linvestment CC v Hammersley and Another 2008 (3) SA 283 (SCA) ([2008] 2 All SA 493) para 25, where it was held that a court can, and should, in terms of its inherent power and in terms of s 173 of the Constitution, develop the common law to cope with modern problems.*" The Court agreed with this submission: "*In this case I am specifically asked to develop the common law so as to make a direct order for costs against a funder possible. In my view there is no reason why such relief should not be available*" (p 222D-F).

Some of the same principles apply to arbitral awards, but as arbitral awards have to be signed by tribunal members, this usually requires a delivery of the original award or an award where the signatures comply with all the legislative requirements for an electronic signature. In most instances, the parties to the arbitration simply agree in advance that awards may be rendered by email (or another means) so that these kinds of technical disputes do not arise.

7.3 Would a court consider a blockchain arbitration agreement and/or award as originals for the purposes of recognition and enforcement?

To date there have been no court decisions or deliberations on this issue. South Africa has ratified the New York Convention, provided for under schedule 3 of the IAA, and so requires a "duly authenticated original award" and the original agreement for the purposes of recognition and enforcement.[25] (or a duly certified copy of both). This is echoed in section 17 of the IAA but is more specific in that the section provides that the original award and agreement must be produced "*authenticated in a manner in which foreign documents must be authenticated to enable them to be produced in any court*".

Current means of authentication under the Uniform Rules of Court would not cater for a blockchain agreement, although there is a catch-all provision in Rule 63(4): "*Notwithstanding anything in this rule contained, any court of law or public office may accept as sufficiently authenticated any document which is shown to the satisfaction of such court or the office, to have been actually signed by the person purporting to have signed such document*."

There is a debate within the international legal community as to whether such agreements and/or awards should be deemed originals, and some within the arbitration community advocate for the idea that enforcement of awards would be expedited if the award and the arbitration agreement would be uploaded to a blockchain.[26] South Africa has not yet adopted a position in this regard, however.

7.4 Would a court consider an award that has been electronically signed (by inserting the image of a signature) or more securely digitally signed (by using encrypted electronic keys authenticated by a third-party certificate) as an original for the purposes of recognition and enforcement?

The domestic Arbitration Act states that the award shall be made in writing and signed by the arbitrator or a majority of the arbitrators in a tribunal.[27] If any signature is absent the reason for this must be stated in the award. The IAA is silent regarding electronic signatures, however, in 2002 South Africa enacted the Electronic Communications and Transactions Act 25 of 2002 ("**ECTA**") which caters for this.

ECTA has followed the global trend of legalising electronic signatures and transactions through legislation. ECTA defines an electronic signature as "*data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature*". ECTA further provides a definition for an "*advanced electronic signature*" which is "an *electronic signature which results from a process which has been accredited by the Authority as provided for in section 37*." Section 37 essentially provides for an established Accreditation Authority to approve of authentication products.

Section 13 of ECTA (under the chapter of electronic transactions) indicates that where the signature of a person is required by law and such law does not specify the type of signature, that requirement in relation to data message is met only if an advanced signature is used.

From these relevant sections in ECTA it appears that where an arbitration agreement is silent on the signature requirements, only a more securely digitally signed method of signature would be accepted. In other words,

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25 International Arbitration Act 15 of 2017 Schedule 3 Chapter IV.

26 Michael Buchwald "Smart Contract Dispute Resolution: The Inescapable Flaws od Blockchain Based Arbitration" Available at: https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9702&context=penn_law_review.

27 International Arbitration Act 15 of 2017 Schedule 1 Article 31.

it is likely that the court would only accept an advanced electronic signature and not simply an image of a signature for the purposes of recognising and enforcing and award.

It is always best to agree upfront (as is done in the vast majority of South African-seated arbitrations) as between the parties to the arbitration in what form the arbitral award may be rendered. Such an agreement eliminates this unnecessarily complex question from a practical perspective.

8. Is there likely to be any significant reform of the arbitration law in the near future?

Unlikely.

The Arbitration Bill, 2019 proposes changes to the law of arbitration in South Africa for the purpose of reworking and improving domestic arbitration, to bring it closer into line with the principles in the IAA.

It is still in draft form with no estimated date of finalisation as of June 2022.

9. Compatibility of the Delos Rules with local arbitration law

The Delos Rules are generally compatible with South African international arbitration law.

10. Further reading

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ARBITRATION INFRASTRUCTURE AT THE JURISDICTION

Leading national, regional and international arbitral institutions based out of the jurisdiction, *i.e.* with offices and a case team?	Arbitration Foundation of Southern Africa (AFSA), which has three divisions: - AFSA Domestic; - AFSA International; and - AFSA SADC. China-Africa Joint Arbitration Centre (CAJAC Johannesburg) The Association of Arbitrators (Southern Africa) International Chamber Of Commerce (has very limited presence at this stage)
Main arbitration hearing facilities for in-person hearings?	Generally agreed by parties or ad hoc venues. Most of the larger law firms host their own arbitrations. AFSA does have its own venues, however.
Main reprographics facilities in reasonable proximity to the above main arbitration providers with offices in the jurisdiction?	Jetline Postnet
Leading local providers of court reporting services, and regional or international providers with offices in the jurisdiction?	Juta LexisNexis Southern African Legal Information Institute (SAFLII) Optima Juris Planet Depos
Leading local interpreters for simultaneous interpretation between English and the local language, if it is not English?	Generally, arbitrations are conducted in English. Afrolingo Translators.org.za
Other leading arbitral bodies with offices in the jurisdiction?	ϕ